SUPREME COURT, U.S.

FILED

FEB 27 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 1103

HERBERT CALLENDER,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

No. .....

HERBERT CALLENDER,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT

Appellant appeals from the order of the Court of Appeals of the State of New York, entered on September 29, 1966, denying appellant's motion for reargument and thereby reaffirming its judgment of July 8, 1966, affirming the conviction of appellant by the Criminal Court of the City of New York, County of New York. The conviction had previously been affirmed by the Supreme Court of the State of New York, Appellate Term, First Department. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinion Below

The Court of Appeals of the State of New York denied appellant's motion for reargument without opinion, 18 NY2d 751 (1966), but granted appellant's motion to amend the remittitur (Appendix, 1a, 18 NY2d 750 (1966)). The Court's previous order affirming the conviction of appellant was without opinion (18 NY2d 621, 219 NE 2nd 287 (1966); Appendix, 3a). The order of the Appellate Term of the Supreme Court of the State of New York, First Department affirming appellant's conviction, one justice dissenting, was without opinion. A memorandum opinion was filed by the dissenting justice (Appendix, 9a). The conviction of appellant in the Criminal Court of the City of New York, County of New York, was without opinion. Appellant received a sixty-day sentence as a result of the conviction herein.

Jurisdiction

This is an appeal from a conviction under Section 722 of the Penal Law of the State of New York commenced by the arrest of appellant on July 15, 1962. Appellant was convicted after trial in the Criminal Court of the City of New York, County of New York, on September 4, 1964. A motion to dismiss on the grounds that the conduct involved was protected under the First and Fourteenth Amendments and that the statute as applied to appellant was unconstitutional was denied in the Criminal Court (R. 43, 44).* These arguments were rejected by the Supreme Court of

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* Numbers in parentheses prefixed by "R" refer to pages of the Record used in the Court of Appeals of the State of New York.

the State of New York, Appellate Term, First Department (order affirming conviction entered: January 20, 1966, R. 65), and by the Court of Appeals of the State of New York (order affirming conviction entered: July 8, 1966; order amending remittitur and denying reargument entered: September 29, 1966). The Notice of Appeal was served and filed on December 28, 1966 in the Criminal Court of the City of New York, County of New York. The jurisdiction of the Supreme Court to hear the appeal rests upon 28 U.S.C. Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to hear the appeal: *Cox* v. *State of Louisiana,* 379 U.S. 559, 85 Sup. Ct. 476 (1965); *Edwards* v. *South Carolina,* 372 U.S. 229, 83 Sup. Ct. 680 (1963); *La Crosse Tel. Corp.* v. *Wisconsin Board,* 336 U.S. 18, 69 Sup. Ct. 379 (1949); *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 Sup. Ct. 900 (1940); *Thompson* v. *Louisville,* 362 U.S. 199, 80 Sup. Ct. 624 (1960).

Questions Presented

The following questions are presented by this appeal:

1. Whether § 722 subd. (1) of the Penal Law of New York which provides that "Any person who *with* intent *to provoke a breach of the peace or whereby a breach of the peace may be occasioned,* . . . (Emphasis supplied)

(1) Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior (is guilty of disorderly conduct)"

is void in violation of the due process clause of the Fourteenth Amendment as applied to a defendant who tests by legal means official conduct and against whom the evidence

shows no intent to provoke a breach of the peace or whereby one may be occasioned.

2. Whether § 722 subd. (2) which provides that "Any person who with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned, . . .

> 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others (is guilty of disorderly conduct)" . . .
>
> (a) is void on its face in violation of the First Amendment because it encompasses speech and conduct protected by that Amendment and prevented Appellant from making a legal test of certain official conduct.
>
> (b) is void in violation of the First and Fourteenth Amendments as applied against one who solicited the support of police officers to effectuate a "citizen's arrest" as provided by law and who was denied the right by the arresting officers to carry out a legal right of a citizen to serve a summons in order to provide a legal test of the conduct of public officials.

3. Whether § 722 subd. (3) of the Penal Law which provides that "Any person who with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned, . . .

> 3. Congregates with others on a public street and refuses to move on when ordered by the police; (is guilty of disorderly conduct)".

is void for vagueness under the "due process" clause of the Fourteenth Amendment when applied to one who is

talking to police officers in order to persuade them to assist him to serve a summons as provided by the law of the State of New York in an orderly fashion in the presence of news reporters coming to observe the institution of the legal test in the corridor of a public building and where no evidence was shown of intent to provoke breach of peace or where one may be occasioned.

4. Whether § 722 of the Penal Law of New York which requires "intent to provoke a breach of the peace" or circumstances "whereby a breach of the peace may be occasioned" is void in violation of the First and Fourteenth Amendments as applied to one merely engaging in peaceful conduct with no evidence showing any danger to the peace, either by appellant or any persons present.

Statute Involved

Section 722 subsections 1, 2 and 3, of the Penal Law of the State of New York; Penal Law, Consolidated Laws, c.40, Section 722, subsections 1, 2 and 3, provide:

"Disorderly conduct.

"Any person who with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

3. Congregates with others on a public street and refuses to move on when ordered by the police."

Statement

Appellant was convicted and sentenced to 60 days in the workhouse on a charge of violation of Section 722 of the Penal Law. Detective Sergeant Dennis Burke and Lieutenant John W. Delehanty testified that on the morning of July 15, 1966 they were on duty at the Police Gate at City Hall, Manhattan. This gate is located inside the City Hall building approximately twelve feet from the main entrance in a corridor eight feet wide (R. 10, 11). At approximately 10:50 a.m., appellant and two other people appeared at the gate. As he arrived, appellant told Sergeant Burke that he had come to City Hall to test the allocation of funds by the Mayor which supported a pattern of discrimination in the Building Trades by effecting the arrest of the Mayor of the City of New York on charges of violating Sections 1838 and 1865 of the Penal Law. In response to this request by appellant to Sergeant Burke for cooperation in this effort, which could have been carried out very simply, appellant was informed by Burke that in the opinion of the New York City Corporation Counsel and the Legal Bureau of the Police Department such an arrest would be illegal; on that basis the Sergeant refused Callender any assistance (R. 12, 13, 24). A similar request directed by appellant to Lt. Delehanty was equally unsuccessful (R. 25).

Appellant was then informed by Sgt. Burke that by his unspecified actions he was causing a crowd to collect. In fact, the crowd of reporters was there before he arrived. No evidence exists that any serious enlargement of the

crowd resulted from any act of the appellant. Appellant was asked to leave the premises but did not do so, stating that he intended to seek further police assistance in effecting the arrest of the Mayor. There were approximately thirty to fifty persons in the corridor area consisting of police officers, newspaper reporters and cameramen, the appellant and two companions. Appellant made a statement which was transcribed by one of the reporters carrying a tape recorder (R. 13, 14, 25, 30). When asked to leave under pain of arrest, appellant never refusing to go, merely reiterated his request for police assistance. At this juncture he was taken into custody by Sgt. Burke (R. 11, 26). The area in which all of these events transpired is one commonly crowded with members of the press and the public and frequently used by city officials for impromptu press conferences. Both police witnesses testified on cross examination that no one had complained to them about being denied entrance or exit through the police gate to or from the inner offices of the Mayor (R. 20, 23, 28). Despite the supposed crowd, Lt. Delehanty testified that several people who had come to City Hall to witness the signing of certain legislation could be and were escorted to an upstairs room to await the Mayor's arrival. This was normal procedure as the Mayor's Reception Room was then otherwise occupied. This group of people did not have to pass through the gate and appellant was not heard to say anything abusive or offensive to them or, for that matter, to anyone else (R. 28, 29). No witnesses were called to testify by the prosecution for the purpose of showing that they could not pass through the corridor.

When he approached the police gate, appellant said that he explained to Sgt. Burke that he had come to make a

citizen's arrest of the Mayor in order to initiate a court action to test the validity of certain appropriations for public construction which were being paid to contractors and ultimately to unions who discriminated against Negroes and Puerto Ricans. Upon being informed by Sgt. Burke and Lt. Delehanty that they would not assist him in carrying out his protest against the City's discriminatory practices, appellant indicated that he wished to wait until he could secure the assistance of a willing officer. At no time was his conduct disorderly nor did the police state so. His arrest followed almost immediately thereafter without any intervening event (R. 33, 34). Mr. Callender testified that he had been advised by counsel that a citizen's arrest would be proper to make such a legal test (R. 37, 38).

How the Federal Question Is Presented.

At the trial in the Criminal Court, counsel for appellant moved to dismiss the charge on the ground that no evidence had been adduced to sustain a conviction under any of the subsections of Section 722 of the Penal Law with which appellant was charged (R. 37). Counsel further argued that appellant's action, being in the nature of a petition to seek redress from official wrong, fell within the ambit of the First and Fourteenth Amendments and, therefore, each subsection of Section 722 under which appellant was charged constituted, as applied, an unconstitutional abridgement of the freedom of speech (R. 38). Without specifically so finding, these arguments were rejected by a general finding of guilt. Nor did the trial court specify the subsection under which appellant was convicted.

The intermediate appellate court, the Appellate Term of the Supreme Court of the State of New York, First De-

partment, also *sub silentio,* rejected arguments based on the theories of protected conduct and the unconstitutionality of Section 722 of the Penal Law as applied; Mr. Justice Hofstadter, dissenting however, agreed with appellant, based on dissenting opinions in *People* v. *Penn* (16 N.Y.2d 872 (1965)) and *People* v. *Turner* (17 N.Y.2d 829 (1966)).

In amending the remittitur, the N.Y. Court of Appeals indicated its consideration of these contentions, but also filed no opinion either at that time or when it originally considered the case. Thus as of this moment except for the dissent of Mr. Justice Hofstadter, no opinion has been filed in any court below, although the issues are substantial.

THE QUESTIONS ARE SUBSTANTIAL

I

As interpreted by the courts below Section 722 is unconstitutional, both on its face and as applied to appellant in violation of the First Amendment and because it is unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment.

By all accounts of the "conduct" of appellant he engaged only in pure speech to solicit the assistance of police officers to assist him to make an arrest. His speech conveyed no threat and was in no way provocative. Compare *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 Supreme Court 900 (1940). His desire to effect the arrest of the Mayor was, as expressed in advance, to test the right of the City of New York to continue discriminatory conduct against racial minorities by unions in the construction trades assisted with

public funds. The policemen on duty testified that they understood his action to be in accord with his objective.

This case involves an exercise of pure speech, an act of petition for redress of official wrong in a public setting which the New York courts have deemed violative of Section 722. Similar to this case we urge is *Gantwell* v. *Connecticut*, 310 U.S. 296, 60 Sup. Ct. 900 (1940) where this Court ruled that the common law standard of breach of the peace had not been met by pure speech in a public setting.

The fact that a number of reporters had gathered prior to appellant's arrival does not dictate any different conclusion. There has been absolutely no showing that this result caused or would occasion a breach of the peace. In fact, the presence of newspapermen, cameramen and police officers in a locale where newsgathering was customary would seem to indicate no likelihood of a possible breach of the peace. See *Edwards* v. *South Carolina*, 372 U.S. 229, 83 Sup. Ct. 680 (1963).

If the police in good faith had been concerned with the alleged traffic situation, they could have easily ordered a slight narrowing of the gathering.

No such action was taken in this case with the result that the exercise of free speech was unconstitutionally infringed. *Cox* v. *Louisiana*, 379 U.S. 536, 85 Sup. Ct. 476 (1965); *Edwards* v. *South Carolina*, *supra*.

The fundamental right to express an opinion on a current matter of national concern, to petition one's government, to make a legal test is of such importance that we urge it warrants this Court's consideration on appeal.

As stated above, the evidence below in no way establishes a breach of the peace within the meaning of Section 722. For a breach of the peace to be sustained, there must be a showing that there has been a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm disturbs the peace and quiet of the community. *People* v. *Most*, 171 N.Y. 423 (1902); *Cantwell* v. *Connecticut*, 310 U.S. 296, 60 Sup. Ct. 900 (1940). In his attempt to register his protest, appellant displayed no intent whatsoever to provoke a breach of the peace nor can such an intent be inferred from the surrounding circumstances. As there was no evidence from which an intent to provoke a breach of the peace might be inferred and no evidence of conditions under which a breach of the peace might have been occasioned, the record herein is "so totally devoid of evidentiary support as to render (the) . . . conviction unconstitutional under the due process clause of the Fourteenth Amendment". *Thompson* v. *Louisville*, 362 U.S. 199, 80 Sup. Ct. 624 (1960). See also *Barr* v. *Columbia*, 378 U.S. 146, 84 Sup. Ct. 1734 (1964) and *Garner* v. *Louisiana*, 368 U.S. 157, 82 Sup. Ct. 248 (1961).

With respect to subsection 1 of Section 722, no evidence was introduced to support a charge that appellant used offensive, disorderly, threatening, abusive or insulting language, conduct or behavior. Inasmuch as the trial court's general verdict of guilty necessarily included a finding that this subsection had been violated, this aspect of the conviction was in violation of the due process requirement of the Fourteenth Amendment. *Thompson* v. *Louisville*, *supra*.

II

No breach of the peace being shown, nor such conduct whereby one may be occasioned, the arrests violated the First and Fourteenth Amendments.

Not having committed a wrongful act and being in a location where he has a right to be, at a time when his presence is legally proper, an arrest of such citizen for failure to move on when ordered, violates the United States Constitution as interpreted by this court in *Edwards* v. *South Carolina, supra* and *Cox* v. *Louisiana, supra* since such arrest is not pursuant to a narrowly drawn, clearly understood statute.

While it may be true that these police officers were advised that the contemplated test by arrest was illegal (the accuracy of such advice is seriously open to question), that in no way gives them the right to demand that Callender leave or be arrested. If Callender's test was improper, an appropriate Court would have so advised him, and that would have ended the matter.

Such conduct as that of the officers, upheld by the New York courts, when a man is trying to use the peaceful processes of the law, is what drives persons onto the streets and into public disorder.

Making such conduct, as that of appellant illegal under Section 722 places an unconstitutional interpretation upon that statute and, we urge, requires reversal of the conviction. See *Terminiello* v. *Chicago,* 337 U.S. 1, 69 Sup. Ct. 894 (1949).

CONCLUSION

It is submitted that the decision of the Court of Appeals of the State of New York renders Section 722 of the New York Penal Law violative of the First and Fourteenth Amendments both on its face and as applied. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

CARL RACHLIN
Attorney for Appellant
Herbert Callender

R. HARCOURT DODDS,
STEPHEN M. NAGLER,
of Counsel

APPENDIX

Order Appealed From (Denying Reargument)

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-ninth day of September A. D. 1966.

Present,

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 927

THE PEOPLE &C.,
Respondent,

vs.

HERBERT CALLENDER,
Appellant.

A motion for reargument and to amend the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Appellant contended that his conduct, which formed the basis of his conviction, was protected under the First and Fourteenth Amendments and, further, that Section 722 of the Penal Law of the State of New York as applied to him was unconstitutional. The Court of Appeals held that appellant's constitutional rights under the First and Fourteenth Amendments had not been violated, and that as applied to him Section 722 of the Penal Law was constitutional.

AND the Criminal Court of the City of New York hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

COURT OF APPEALS

No. 221

Remittitur

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Witness,

The HON. CHARLES DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

Remittitur July 7, 1966.

App T. 1. No. 221.

THE PEOPLE &c.,

Respondent,

vs.

HERBERT CALLENDER,

Appellant.

BE IT REMEMBERED, That on the 7th day of May in the year of our Lord one thousand nine hundred and sixty-six, Herbert Callender, the appellant in this cause, came here unto the Court of Appeals, by William S. Ellis, and Carl Rachlin, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the

Appellate Term of the Supreme Court, First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William S. Ellis, of counsel for the appellant, and by Mr. Frederick P. Hafetz, of counsel for the respondent, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 7, 1966.

(Seal)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

Order of Appellate Term

At an Appellate Term of the Supreme Court, First Department, held on the County Court House, Borough of Manhattan, City of New York, on the 20th day of January, 1966.

Present:

HON. SAMUEL M. GOLD, *J.P.*,

" LOUIS J. CAPOZZOLI,

" SAMUEL H. HOFSTADTER, (dissenting)

Justices.

Nov. #422

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

HERBERT CALLENDER,

Defendant-Appellant.

An appeal having been taken to this court by defendant from a judgment of conviction of the Criminal Court of the City of New York, County of New York, after trial before Hon. Mitchell J. Sherwin, on the 25th day of November, 1964, upon the charge of violating §722, subds. 1, 2, and 3 of the Penal Law, and having been sentenced by Hon. Louis A. Cioffi on the 13th day of January, 1965, as follows:

60 days in the Workhouse

and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgment so appealed from be and the same is hereby affirmed.

Enter

S M G
Justice Appellate Term
Supreme Court, First Department.

Appellate Term Decision

APPELLATE TERM OF THE SUPREME COURT,
FIRST DEPARTMENT, NOVEMBER, 1965

Present:

HON. SAMUEL M. GOLD, *J.P.*,
" LOUIS J. CAPOZZOLI,
" SAMUEL H. HOFSTADTER,

Justices.

No. 422

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

HERBERT CALLENDER,

Defendant-Appellant.

Appeal by defendant from a judgment of conviction of the Criminal Court of the City of New York, County of New York, after trial, of violating section 722, subdivisions 1, 2 and 3 of the Penal Law [disorderly conduct].

PER CURIAM:

Judgment of conviction affirmed.

I concur, S M G

I concur, L J C

I dissent and order to reverse the conviction and to dismiss the Complaint (S H H)

Dissenting Memorandum

PEOPLE v. CALLENDER

November No. 422

HOFSTADTER, *J.*:

For the reasons stated in my dissenting opinion in People v. Penn et al., February, 1964, #45, 152 N.Y.L.J. 76, October 16, 1964, p. 16, affd. 16 N.Y. 581, motion to amend remittitur granted September 27, 1965, and in my dissenting memorandum in People v. Turner et al., May 1965, #145, 154 N.Y.L.J. 93, November 15, 1965, p. 16, my view is that defendant's acts were constitutionally protected and did not constitute disorderly conduct within the purview of Penal Law, Section 722 constitutionally delimited. I therefore dissent and vote to reverse the conviction on the law and on the facts and to dismiss the complaint.

12/22/65

SAMUEL H. HOFSTADTER